85-1380

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MELBA JOSEPHINE ARNOUX WOODHOUSE,
Petitioner,
WILLIAM FOREST BIG SPRING, SR.,
Plaintiff/Appellant,
v.
THE UNITED STATES, BUREAU OF INDIAN AFFAIRS, SECRETARY OF THE INTERIOR, AND THE BLACKFEET TRIBE OF INDIANS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether 28 U.S.C. Section 2401(a) bars Melba Josephine Arnoux Woodhouse's claim for her full allotment under 25 U.S.C. Section 345.

2. Whether the Blackfeet Tribe of Indians is subject to suit on an action for allotment to secure complete adjudication of rights.

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No. -

MELBA JOSEPHINE ARNOUX WOODHOUSE,
Petitioner,

WILLIAM FOREST BIG SPRING SR.,
Plaintiff/Appellant,

v.

THE UNITED STATES, BUREAU OF INDIAN AFFAIRS, SECRETARY OF THE INTERIOR, AND THE BLACKFEET TRIBE OF INDIANS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Melba Josephine Arnoux Woodhouse hereby respectfully petitions the United States Supreme Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 767 F.2d 614 (9th Cir 1985) and is reproduced in Pet. App. pp. 1a-7a. The opinion of the United States District Court for the District of Montana is reproduced at Pet. App. pp. 8a to 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on 31 July 1985. Both Petitioner Woodhouse and Appellant Big Springs petitioned for rehearing. The Petitions for Rehearing were denied on 10 October 1985 and the United States Supreme Court allowed an extension of time in which to file a Petition for Writ of Certiorari to 7 February 1986. The jurisdiction of this Court exists under 28 U.S.C. Section 1254.

STATUTES, TREATIES AND OTHER LAWS INVOLVED

The issues in the present case concern principally the statute, 25 U.S.C. Section 345 and related statutes and the effect of 28 U.S.C. Section 2401(a), if any on the application of said statute and whether the Blackfeet Tribe is made subject to suit on actions arising under 25 U.S.C. Section 345.

STATEMENT OF THE CASE

The Petitioner, Melba Josephine Arnoux Woodhouse, is an Indian person, enrolled as a member of the Blackfeet Tribe. She was born 20 December 1912. She finally received her allotment of land in 1922.

The land allotted to her with minerals reserved to the Blackfeet Tribe is described as follows:

> Section 23, Township 35 North, Range 12 West Montana Principal Meridian, S1/2NE1/4SE1/4 N1/2SE1/4SE1/4 S1/2S1/2SE1/4,
>
> Section 25, Township 35 North, Range 12 West Montana Principal Meridian, W1/2NE1/4 E1/2NW1/4 NE1/4SW1/4 E1/2NW1/4SW1/4 N1/2SE1/4SW1/4 NW1/4SE1/4
>
> Section 23, Township 33 North, Range 7 West, MPM, SE1/4NW1/4

In 1919 by act of Congress any and all minerals were reserved for the Blackfeet Tribe of Indians.

The basis of Petitioner's Complaint is that the United States Government, acting by and through its agents and employees, had the duty, responsibility and obligation to select an allotment for Petitioner as provided in 25 U.S.C. Sections 332 and 333 within a reasonable time after her birth.

Petitioner, Melba Josephine Arnoux Woodhouse, filed her Complaint on 1 December 1982. The United States filed an Answer on 9 February 1983 for all federal defendants asserting various defenses and affirmative defenses. The Blackfeet Tribe filed its Answer on 28 July 1983. Petitioner filed an Amended Complaint on 4 October 1983, the United States filed an Answer to Amended Complaint on 8 November 1983 asserting various defenses and affirmative defenses. The Blackfeet Tribe filed an Answer to Petitioner's Amended Complaint on 9 November 1983. Motions to Dismiss were filed and argued and on 18 May 1984 the District Court dismissed the Complaint

of Melba Josephine Arnoux Woodhouse and co-plaintiff, Big Spring, on the basis that granting the allotments was discretionary with the Secretary and that the Plaintiffs could not complain. Motions to Alter or Amend Judgment were filed supported by Briefs and the Motions for Reconsideration or to Alter or Amend the Judgment were denied on 30 July 1984.

Thereafter and within the time prescribed by law, the Petitioner, Melba Josephine Arnoux Woodhouse, and Appellant, Big Spring, appealed to the United States Court for the Ninth Circuit Court of Appeals. The cases of Woodhouse and Big Spring were argued in the Ninth Circuit Court of Appeals and the Decision and Opinion were rendered on 31 July 1985. Motions for Reconsideration was filed and those motions were denied on 10 October 1985. Melba Josephine Arnoux Woodhouse, Petitioner herein, now Petitions this Court for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Petitioner, Melba Josephine Arnoux Woodhouse, is an Indian person and has been from her birth in 1912. She was a ward of the United States Government and continues to be a ward of the United States Government. The United States Court of Appeals for the Ninth Circuit has applied a statute of limitation, 28 U.S.C. Section 2401(a) against its own ward contrary to the intent of the law and the general principles of guardian and ward relationships. A special and specific statute was enacted to allow the ward to pursue an action for her allotment and no limitation on that right exists.

Further, the United States Court of Appeals for the Ninth Circuit has, in error, dismissed the Blackfeet Tribe. The Blackfeet Tribe is necessary to secure just, complete and final adjudication of Petitioner's rights.

ARGUMENT

Issue No. 1: Whether 28 U.S.C. Section 2401(a) bars Melba Josephine Arnoux Woodhouse's claim for her full allotment under 25 U.S.C. Section 345.

The opinion and decision of the United States Circuit Court of Appeals for the Ninth Circuit is contrary to the holding of the Eighth Circuit Court of Appeals in *Mottaz v. United States*, 753 F2d 71 (8th Cir. 1985) and *Oneida County, N.Y. v. Oneida Indian etc.*, 470 U.S.—84 L.Ed.2d 169, 105 S.Ct. 1245, (1985), and is contrary to the congressional policy of protecting the Indian persons and their interests in land.

It is Petitioner's position that the United States government, the President and agents thereof, had the affirmative duty and responsibility to select an allotment for her not later than four (4) years after her birth and she has relied upon the laws of the United States which are primarily codified in Title 25 U.S.C. 25 U.S.C Section 3 charges the Commissioner of Indian Affairs with compiling statutes and regulations. 25 U.S.C. Section 174 charges the President with the general superintendence, care and protection of Indians. 25 U.S.C. Section 331, Allotments on Reservations—Irrigable and nonirrigable lands provides in relevant part as follows:

> . . . the President shall be authorized to cause the same or any part thereof to be surveyed . . . and to cause allotment to each Indian

> located thereon to be made in such areas as in his opinion may be for their best interest . . . the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act . . . .

25 U.S.C. Section 332, Selection of allotments, provides in relevant part as follows:

> All allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. . . . Provided, that if any one entitled to an allotment shall fail to make a selection within *four years* after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner. (Emphasis supplied by writer)

25 U.S.C. Section 333, Making of allotments by agents, provides in relevant part as follows:

> The allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the re-

spective reservations on which the allotments are directed to be made, . . .

Based on the rights created and granted by the foregoing sections, Petitioner, Woodhouse, brought an action under 25 U.S.C. Section 345, Action for Allotments, which in relevant part provides as follows:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as

> if such allotment had been allowed and approved by him, ...

Congress, in enacting the law which is codified at 25 U.S.C. Section 345, did not provide for any limitation on those actions. Congress did not even suggest or imply that there was a limitation. The Ninth Circuit Court of Appeals has not applied any statute of limitations until only recently when it adopted the general statute of limitations for actions against the United States, 28 U.S.C. Section 2401(a) which provides in relevant part as follows:

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.
>
> * * *

Even though Section 2401(a) has no relationship to 25 U.S.C. Section 345, it does recognize that if any persons is under a legal disability that said person has three years after the disability ceases to commence an action. In this case, Petitioner, Woodhouse, is a ward of the United States and is under the same legal disability as any minor or other incompetent person. The United States Congress has not seen fit to remove that disability. Therefore, even if Section 2401(a) applied in actions brought for allotments, the legal disability has not been removed. The Ninth Circuit has not recognized a statute of limitations until in the very recent case of *Christensen v. United States*,

755 F2d 705, 707 (9th Cir. 1985) and in the case involving the present Petitioner. The United States Court of Appeals has in the past considered Indian cases for allotments without any consideration of statute of limitations questions. The case of *Mottaz v. United States, supra*, recognized that Congress has not repudiated its policy of protecting Indian land. The United States Supreme Court in the recent case of *County of Oneida N.Y. v. Oneida Indian Nation of N.Y. State etc., supra*, recognized rights of Indian Tribe in lands and determined that there was no controlling federal limitations period and that to borrow a state limitations period would be inconsistent with the federal policy against the application of state statutes of limitations in the context of Indian claims. The *Oneida case* also recognized the principle that the congressional intent to extinguish Indian title must be plain and unambiguous and will not be lightly implied. The holding of the Ninth Circuit that the general statute of limitations limits claims against the United States should in Indian allotment cases is contrary to the general Indian Policy. The United States Supreme Court has recognized Congress' reluctance to impose any statute of limitations on Indians' rights in an action for their property interests, *Oneida County N.Y. v. Oneida Indian etc., supra*, pp. 1255, 1256. A recent *Harvard Law Review* comment on the *Oneida case* was favorable toward the Court's decision but was extremely critical of the Court's suggestion that Congress should take steps to limit the Indians' rights. That Law Review article stated, in essence, that it is the Court's responsibility to protect the Indians' rights and interests against legislative excesses, not to advocate legislation. That article recognized that there is very strong trust responsibility

resting on the United States towards the Indians, 99 *Harvard Law Review*, 254, No. 1 Nov 1985. Historically, there has been a very strong trust responsibility recognized and imposed. From the earliest days of the Republic there has been recognized a special responsibility to the Indians by the Government with no limitations imposed on the exercise of Indian rights.

The Northwest Ordinance adopted on 13 July 1787 provided in relevant part as follows:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them .... Journals of the Continental Congress, 32:340-41

In the Cherokee cases, Chief Justice Marhsall of the United States Supreme Court described the tribes as domestic-dependent nations whose relation to the United States resembled that of the ward to his guardian, *The Cherokee Nation v. The State of Georgia*, 30 U.S. (5 Pet) 17; 8 L.Ed. 1 (1831); 27 Stanford Law Rev. 1213, 1216. The idea was to protect the Indians' ownership of real property, 27 Stanford Law Rev. 1213, 1216. In *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, (1886) the Supreme Court said that the Indian Tribes are wards of the nation,

they are communities dependent upon the United States. From their very weakness and helplessness there arises the duty of protection and with it the power. In *Cramer v. United States*, 261, U.S. 219, 43 S.Ct. 342, 67 L.Ed. 622, (1923) the court voided a federal land patent that 19 years earlier had conveyed lands occupied by Indians to a railway. The basis of voiding it was trust responsibility and national policy protecting Indian land. In *Seminole Nation v. United States*, 316 U.S. 286, 62 S.Ct. 1049 (1942), the U. S. Supreme Court declared that the action of the United States must be judged by the most exacting fiduciary standards. A recent case, *United States v. Mitchell*, 406 U.S. 206, 77 L.Ed.2d 580, 103 S.Ct. 2961 (1983) recognizes in rather strong language the trust responsibility of the United States government. At page 2912 the Court quotes from Representative Howard as follows:

> Referring to the relationship between the Indians and the Government as a "sacred trust," Representative Howard stated that "[t]he failure of their governmental guardian to conserve the Indians' land and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the Indian. 78 Cong. Rec., at 11726.

at page 2972:

> Where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided oth-

> erwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection. *Navajo Tribe of Indians v. United States*, 224 CT.Cl. 171, 183, 624 F.2d 981, 987 (1980).
>
> [6 7] Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people *Seminole Nation v. United States, supra.*

In 27 Stanford Law Rev. 1213 at 1242 it is stated:

> In Indian cases the divided loyalty which often obstructs full enforcement of the trust responsibility would seem to require greater rather than less judicial scrutiny of the administrative action.

It is clear from the foregoing, that the Petitioner, Woodhouse, is a ward of the United States Government. The United States, as trustee in this case, has taken adversarial position against Woodhouse and her co-plaintiff, Big Spring, which is contrary to accepted law and fiduciary responsibilities. The United States Government has been charged from the beginning of Indian policy with being the guardian and trustee of individual Indians. Guardians and trustees have special responsibilities:

> 39 Am. Jur. 2d Section 1, Definition and nature. A guardianship is a trust relation of the most sacred character, in which one person, called a "guardian," acts for another, called the "ward," whom the law regards as incapable of managing his own affairs.
>
> Section 160. Generally. It is a firmly established general rule that an action at common law cannot be maintained between a guardian and a ward while that relation exists. The character of the relation, the capacity in which the guardian acts, and his duty to the ward's property ordinarily forbid that he occupy the distinctly adverse position of suitor, . . .
>
> Section 157 Defense of suit by guardian. The guardian has the power—and the duty, . . . to provide for the defense of any action against his ward, so far as is necessary for the protection of the latter's person or property, . . .

Cases from various jurisdiction support the foregoing general statements of the law. In *Rupe v. Robinson*, 247 Pac. 954 (Wash. 1926) the court stated that a guardian cannot maintain an action at law against the ward while the relation exists. The character of the relation, the capacity in which the guardian acts, the duty to the ward's property forbid that he should occupy the distinctly adverse position of suitor at law, especially as to transactions occurring since the guardianship commenced. In *Smith v. Merkle*, 136 NE2d 749 (Ohio 1956) the Supreme Court of Ohio stated that the fiduciary position should be surrendered if there is to be an adversarial position taken.

In an opinion authored by the present Chief Justice, Warren E. Berger, the Court stated in *Clarke v. Hickman*, 307 F.2d 660, 662, 663 (DC Cir. 1962), that as a general rule, no action at law may be maintained by a guardian against a ward while the relationship exists because of the fiduciary duty and trust capacity. The statute of limitations does not begin to run until the trustee enters a final account with a court or demands reimbursement or until his death. The position taken by the United States and the Ninth Circuit in this case is contrary to the foregoing principles of law. If the Congress feels the guardian-ward relationship no longer has applicability, it is up to Congress to change the relationship and to establish a limitations period but it is not the duty of the Court to try to establish a limitation on Indian statutorily granted rights.

Issue No. 2: Whether the Blackfeet Tribe of Indians is subject to suit on an action for allotment to secure complete adjudication of rights.

The Blackfeet Tribe has admitted in its Answer to Woodhouse's Complaint that it, in fact, has received all proceeds from the mineral interests over the years which should have been allotted to Petitioner, Woodhouse. Because the Tribe has received those proceeds, it is necessary that they remain a party to the lawsuit and to account for those proceeds received. Otherwise, the Tribe would be unjustly enriched. 25 U.S.C. Section 345 should be construed to authorize suit against the Tribe to secure complete adjudicated. 25 U.S.C. Section 345 should be construed to have waived any sovereign immunity that the Tribe may have or claim to have where the claim is for an allotment.

CONCLUSION

From the foregoing it is readily apparent that any attempt to impose a statute of limitations on a claim by an Indian for allotment would be totally inconsistent with the Federal Government's role as it relates to Indians and the policy of the Government as it has been enunciated from its earliest dealings with the Indians. Further, it is necessary that the Tribe be retained as a Party for complete adjudication in this matter. Petitioner requests this Court to Grant a Petition for Certiorari directed to the Ninth Circuit Court of Appeals and to reverse the Ninth Circuit Court of Appeals.

Respectfully submitted,

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February 7, 1986

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-4141 D.C.
CV 82-181 GP

WILLIAM FOREST BIG SPRING SR.,
Plaintiff/Appellant,

v.

THE UNITED STATES OF AMERICA,
BUREAU OF INDIAN AFFAIRS, *et al.*,
Defendants/Appellees.

No. 84-4170 D.C.
CV 82-161 GF PGH

MELBA JOSEPHINE ARNOUX WOODHOUSE,
Plaintiff/Appellant,

v.

THE UNITED STATES OF AMERICA,
BUREAU OF INDIAN AFFAIRS, *et al,*
Defendants/Appellees.

FILED

Jul 31, 1985

Appeal from the United States District Court
for the District of Montana
Hon. Paul G. Hatfield, District Judge, presiding

Argued and submitted—June 6, 1985
Seattle, Washington
Before: CHOY, HUG, and BOOCHEVER, Circuit Judges.

Big Spring and Woodhouse, Blackfeet Indians (plaintiffs), appeal the dismissal of their claims that the mineral rights to their federal land allotments were wrongfully reserved for the Blackfeet Tribe by the Bureau of Indian Affairs. Because the district court did not have jurisdiction over the defendants, the United States and the Tribe, we affirm the dismissal.

FACTS

The General Allotment Act of 1887, 25 U.S.C. §§ 331-358 (1982), established procedures for selection of allotments of reservation land to individual Indians. Section 332 provides that Indians shall make selections for themselves and their minor children, and that if anyone eligible for an allotment fails to select one within four years of the start of allotment on that reservation, the Secretary of the Interior (Secretary) "may direct" that an allotment be selected for that person.

The Act of March 1, 1907 (Blackfeet Allotment Act), 34 Stat. 1015, 1035, authorized allotments on the Blackfeet reservation pursuant to the provisions of the General Allotment Act. Big Spring and Woodhouse are members of the Blackfeet Tribe. Woodhouse was born in 1912; Big Spring was born in 1916. For reasons not explained in any of plaintiffs' pleadings, selection was not made for either plaintiff until 1922. In the intervening time, Congress had passed the Act of June 30, 1919 (Mineral Act), § 10, 41 Stat. 3, 17, which provided that all future Blackfeet allotments contain a reservation of the mineral rights in the allotted land to the Blackfeet Tribe. Plaintiffs' parents contain this reservation.

Plaintiffs separately filed suit in federal district court against the United States and the Blackfeet Tribe, seeking declarations that they had owned the mineral rights in their allotments since 1922, and seeking damages including the amount of income that the Tribe had received for their mineral rights since 1922. Plaintiffs claimed that the United States had a duty to see that they received their allot-

ments, and by failing to do so before Congress passed the Mineral Act, the United States deprived them of their mineral rights.

The United States and the Tribe separately moved to dismiss each complaint. The Tribe's motion asserted three grounds; sovereign immunity of the Tribe, laches, and failure to state a claim upon which relief could be granted. The United States' motion also asserted three grounds: sovereign immunity of the United States, the statute of limitations, and failure to state a claim. The district court consolidated the cases for pretrial purposes and ultimately dismissed both complaints. The court did not address tribal sovereign immunity, but concluded that it had jurisdiction under section 345 of the General Allotment Act, which provides that Indians who claim to have been unlawfully denied an allotment may bring suit against the United States in district court. The court then held that the complaints failed to state claims on which relief could be granted, because plaintiffs did not have vested rights to allotments when the Mineral Act was passed. The opinion does not mention the statute of limitations or laches issues. Plaintiffs' single and joint appeals from this judgment were consolidated in this court.

STANDARD OF REVIEW

All of the questions presented by this appeal are issues of law which this court reviews de novo. *See Halet v. Wend Investment Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982). We may affirm the district court on any ground supported by the record, even if the district court relied on different reasons. *Salmeron v. United States*, 724 F.2d 1357, 1364 (9th Cir. 1983).

I. JURISDICTION OVER THE UNITED STATES

A. Sovereign Immunity

Plaintiffs base jurisdiction over the United States on section 345 of the General Allotment Act, which permits federal courts to determine whether an Indian allottee has been deprived of an allotment or rights connected with an

allotment. *Christensen v. United States*, 755 F.2d 705, 707 (9th Cir. 1985). This court has previously held that section 345 is a waiver of the United States' sovereign immunity. *Id; Scholder v. United States*, 428 F.2d 1123, 1126 (9th Cir.), *cert. denied*, 400 U.S. 942 (1970).

The United States does not dispute this general principle, but contends that it is immune because section 345 does not apply to suits over mineral rights. This contention is meritless. Section 345 is not limited to actions to compel issuance of an allotment; it permits actions to define or protect an allotment once issued. *christensen*, 755 F.2d at 707 (suit for right of way over federal land to landlocked allotment); *Loring v. United States*, 610 F.2d 649, 650 (9th Cir. 1979)(inverse condemnation of allotment lands); *United States v. Pierce*, 235 F.2d 885, 888-89 (9th Cir. 1956)(suit to compel allotment of land and appurtenant water rights; *accord Begay v. Albers*, 721 F.2d 1274, 1277-78 (10th Cir. 1983)(suit to cancel forged deeds conveying allottees' allotments to non-Indians).

The United States relies principally on *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972). *Ute Citizens* held that section 345 did not waive the United States' immunity in a suit for mineral rights reserved for a tribe by the United States. Section 345 did not apply because the rights in question were appurtenant to tribal land, not to the plaintiffs' allotments. *Id.* at 142-43. *Ute Citizens* is not on point because plaintiffs seek mineral rights appurtenant to their allotments. In the other cases cited by the United States, the courts similarly refused to apply section 345 because the claims did not concern plaintiffs' individual allotments. *See, e.g., Scholder*, 428 F.2d at 1126 (suit challenging BIA management of tribal irrigation system). Plaintiffs' claims in essence seek to compel issuance of the missing mineral rights appurtenant to their allotments, and section 345 applies in this case to waive the United States' sovereign immunity.

B. Statute of Limitations

The United States argues that 28 U.S.C. § 2401(a) (1982), which provides a six-year statute of limitation

for "every civil action commenced against the United States," bars this suit. Section 2401(a), if it applies, is jurisdictional. *Loring*, 610 F.2d at 650. Until recently, there was some doubt as to whether section 2401(a) always applied to section 345 claims, because this circuit, without discussing the statute, has reached the merits of claims that clearly had accrued more than six years before suit was filed. *See Sampson v. United States*, 533 F.2d 499 (9th Cir. 1976)(per curiam). There have also been doubts as to whether section 2401(a) applies to both legal and equitable relief sought under section 345. The recent *Christensen* opinion, however, unequivocally holds that section 2401(a) applies to all section 345 claims, whether for legal or equitable relief.[1] *Christensen*, 755 F.2d at 708 (explicitly holding that any sub silentio ruling in *Sampson* must be disregarded in light of *Loring* and *Werner v. United States*, 188 F.2d 266, 268 (9th Cir. 1951) (§ 2401(a) applies to all actions against the United States except criminal or admiralty proceedings)). Moreover, this circuit has twice rejected the argument that the United States may not invoke a statute of limitations against an Indian because of the special trust relationship between the government and the Indians. *Christensen*, 755 F.2d at 707-08 (§ 345 claim); *Mann v. United States*, 399 F.2d 672, 673 (9th Cir. 1968)(Federal Tort Claims Act statute of limitations). The district court had no jurisdiction over

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[1]The Eighth Circuit has held section 2401(a) inapplicable to a section 345 claim, but only in very narrow circumstances. *See Mottaz v. United States*, 753 F.2d 71, 74 (8th Cir. 1985). *Mottaz* applied the principle that when Indian allotment land is conveyed in violation of restrictions on its alienability, title is not transferred. Because the underlying conveyance is void, the Indian allottee retains title. Thus, the court reasoned, the concept of a cause of action accruing is inapplicable, and the statute of limitations cannot apply. *Id.* This rule by its terms cannot apply in this case.

the United States, and did not err in dismissing the claims against it.

II. JURISDICTION OVER THE TRIBE

The Tribe did not raise sovereign immunity on appeal. we must nevertheless consider the issue because tribal immunity is jurisdictional. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 173 (1977); *see United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940)(tribal immunity not waived by failure to raise it at trial or on appeal).

Indian tribes, as sovereign entities, are generally immune from suit. *Santa Clara Pubelo v. Martinez*, 436 U.S. 49, 58 (1978)(claims under Indian Bill of Rights); F. Cohen, *Handbook of Federal Indian Law* 324 (2d ed. 1982). A tribe may waive this immunity by consenting to suit in its constitution or a tribal ordinance. *E.g, Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980)(en banc), *aff'd* 455 U.S. 130 (1982); *Fontenelle v. Omaha Tribe*, 430 F.2d 143, 147 (8th Cir. 1970). Congress, pursuant to its plenary authority over Indian affairs, may also waive this immunity, but that waiver cannot be implied. It must be unequivocally expressed. *Santa Clara Pueblo*, 436 U.S. at 58-59.

There is nothing in the record which indicates that the Blackfeet Tribe has waived immunity to this suit by its constitution or by any ordinance. Thus, the only potential source of a waiver is section 345.[2] This section does not

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[2] § 345. Actions for Allotments

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their

mention tribes: it provides that "the parties [to section 345 suits] shall be the claimant as plaintiff and the United States as party defendant." Any waiver of tribal immunity in section 345 must be by implication, and *Santa Clara Pueblo* forbids implying such a waiver. 436 U.S. at 58-59. We conclude that the district court had no jurisdiction over the Tribe because of the Tribe's sovereign immunity.[3] The district court did not err in also dismissing the complaints against the Tribe.[4]

The judgment of the district court is AFFIRMED.

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respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

[3]The only section 345 case that we have found which addresses immunity held that the tribe had consented to suit in its charter. *Fontenelle*, 430 F.2d at 147. This holding implicitly recognized that without such consent the tribe was immune.

[4]Appellant Woodhouse suggested without citation at oral argument that the Tribe is a person under 42 U.S.C. § 1983 (1982), and that section 1983 waives the Tribe's sovereign immunity as well as providing a cause of action. Plaintiffs' complaints included section 1983 claims. We decline to address this issue because it was not briefed and therefore was not properly before the court. *See* Fed. R. App. P 28(a); *Carducci v. Regan*, 714 f.2d 171, 177 (D.C. Cir. 1983)("where counsel has made no attempt to address [important issue of first impression], we will not remedy the defect"). We note, however, that this circuit recently held that section 1983 claims may not be brought against a tribe. *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 f.2d 979, 982 (9th Cir. 1983), *cert. denied*, 53 U.S.L.W. 3882 (U.S. June 17, 1985).

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

No. CV-82-181-GF
CV-82-161-GF

WILLIAM FOREST BIGSPRINGS, SR., AND
MELBA JOSEPHINE ARNOUX WOODHOUSE,
Plaintiffs,

VS.

THE UNITED STATES, BUREAU OF INDIAN AFFAIRS,
SECRETARY OF THE INTERIOR AND THE BLACKFEET TRIBE
OF INDIANS,
Defendants.

FILED

May 21, 1984

The above captioned cases, which have been consolidated for consideration of pretrial motions, each raise the issues whether the plaintiffs have been wrongfully deprived of rights to and proceeds from the mineral estates underlying their respective allotments of land on the Blackfeet Indian Reservation.

Plaintiff Woodhouse is a member of the Blackfeet Tribe, born December 20, 1912. She does not particularize how her allotment was in fact acquired but does allege that she did not receive her allotment until 1922.

Plaintiff Bigspring is a member of the Blackfeet Tribe, born January 3, 1916. His allotment was also received in 1922.

Essentially, each plaintiff alleges that the Government had an affirmative duty to select an allotment for them

prior to 1919; that the Government's failure to so select their allotments resulted in the allotments containing mineral reservations to the Blackfeet Tribe; that they should be declared the owners of the mineral estates and receive from the Tribe all revenues received as a result of ownership of the mineral estates, or in the alternative, damages from the Government for its failure as alleged. Each plaintiff also alleges that they have been deprived of property without compensation and without due process of law.

Allotments of reservation land to individual Blackfeet and other Indians were made pursuant to the Act of February 8, 1887 (24 Stat. 388) as amended, referred to as the General Allotment Act, 25 U.S.C. §§331 *et seq.* That portion of the Act codified at 25 U.S.C. §332 provided for the selection of allotment lands by the individual Indians, heads of families selecting for their minor children, and further provided as follows:

> That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

As stated, no allotment selection was made by or for either plaintiff until 1922. In the meantime, the Act of June 30, 1919 (41 Stat. 3, 17) became effective which resulted in the disputed mineral reservations. Said statute provides *inter alia* as follows:

> . . . the Secretary of the Interior is authorized to make allotments under existing laws within the [Blackfeet] reservation to any Indians of said Blackfeet Tribe not heretofore allotted, . . . Provided . . ., That any and all minerals, including

> coal, oil, and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly. . . .

The defendant, Blackfeet Tribe has moved to dismiss each of the plaintiff's actions. The Government defendants have answered the complaints and raise, as affirmative defenses, essentially the same defenses posited in the Tribe's motions to dismiss. The Tribe asserts that this court is without subject matter jurisdiction; that the Government had no affirmative duty to make plaintiffs' allotment selections under the General Allotment Act prior to 1919; and that because plaintiffs' rights to an allotment did not vest prior to the effect of the Act of June 30, 1919, the mineral rights were properly reserved to the Tribe pursuant to the latter Act which amended the General Allotment Act.

After careful consideration of the pleadings and the arguments of all parties, the court has determined that this court does have jurisdiction to consider the merits of plaintiffs' claims but that each action should be dismissed as failing to state a claim upon which relief may be granted.

JURISDICTION

Federal jurisdiction, in actions by Indians concerning allotments, derives from 25 U.S.C. §345, and 28 U.S.C. §1353.

> The jurisdiction conferred by Sections 345-346 includes actions by Indians to quiet title or recover possession of previously granted allotments or portions thereof, and to adjudicate other rights connected with beneficial ownership of the allotment. The statute does not confer jurisdiction to challenge administrative policies of the Department of the Interior, or jurisdiction over actions by non-Indians. Nor does it apply to Indian lands

> other than allotments. The basic requisite for jurisdiction is an issue concerning Indian ownership of all or a portion of an allotment under federal restrictions.

Cohen's Handbook of Federal Indian Law, Ch. 6, Sec. A3c, p. 314 (1982).

In *Scholder v. United States,* 428 F.2d 1123 (9th Cir. 1970), the Ninth Circuit held that §345 did not confer jurisdiction in an action by Indians to enjoin the Bureau of Indian Affairs from expending funds to construct pipelines from an irrigation project to a tract of land purchased by a non-Indian from an Indian allottee. In doing so, however, the court rejected the proposition that governmental consent to suit under §345 is limited to suits to compel the issuance of allotments in the first instance. The court quoted from its earlier decision in *United States v. Pierce,* 235 F.2d 885, 888 (9th Cir. 1956) as follows:

> "The contention is based upon an unreasonable limitation as to the purpose of the statute. So limited, the allotment might be made, but subject to such restrictions as would deny the Indian full possession of the land or illegal restraint as to its, occupancy, or as to the produce therefrom, and he could do nothing about it but to complain with the hope of adjustment."

428 F.2d, at 1126. *See also: Id.,* at n. 3. The district court in *Scholder* was found by the Court of Appeals to have jurisdiction on the Indians' challenge to reimbursement charges found to operate as liens on the allotments.

The Ninth Circuit has also held, in *Loring v. United States,* 610 F.2d 649 (9th Cir. 1979), that jurisdiction was conferred under §345 and §1353 in an action for damages arising out of a city's condemnation of rights-of-way on Indian allotment land. "These provisions [25 U.S.C. §§323-325 and 25 C.F.R. §161.12], protecting the Indian allotment against improvident grants of rights-of-way, give use to rights appurtenant to the allotted lands. Federal jurisdiction under 25 U.S.C. §345 and 28 U.S.C. §1353 exists

to entertain an action brought to preserve these rights." *Id.*, at 651.

In these present actions, plaintiffs are alleging entitlement to ownership of and proceeds from the mineral estates underlying their allotments. They allege their entitlement to have been conferred by the General Allotment Act as amended. In this court's opinion, these actions fall within the reading of the jurisdictional statutes given by the Ninth Circuit Court of Appeals in the decisions cited above.

In a different context, the U.S. Supreme Court has considered the application of §345 to an action by Indians concerning mineral rights. *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972). That action arose out of the Ute Indian Supervision Termination Act of 1954. The majority of the Court found that jurisdiction was not conferred by §345 as the mineral rights sought by the plaintiffs were not the subject of an allotment. Justict Douglas filed a dissenting opinion in which he opined that too narrow an interpretation was given §345. In a note to his opinion, Justice Douglas referred to *Scholder, supra* and its holding that "challenges to liens placed upon Indian lands fell within the jurisdictional scope of §345." He then stated that "[c]ertainly the divestitute of interests in lands, alleged here [mineral rights], should not be entitled to a lesser degree of protection than the imposition of a lien." 406 U.S., at 162, n. 3.

The reasons for the majority's declination to find jurisdiction under §345 in the A.U.C. case are not present here. Moreover, the court finds Justice Douglas' remarks, comparing *Scholder* to an action by Indians for mineral rights, to be compelling, especially in a case such as this where the right asserted is alleged to have been conferred by the allotment statutes.

Thus the court has concluded that it is empowered to reach the merits of this case, i.e., whether plaintiffs are entitled to the mineral rights connected with their allot-

ments. For the reasons set forth below, the court has concluded that plaintiffs were not, and are not, so entitled.

DISPOSITION

Necessarily, the focus of each complaint in these cases is upon the four year provision of the General Allotment Act contained in 25 U.S.C. 332. Again, that section provides in pertinent part:

> That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior *may* direct the agent . . . to make a selection for such Indian.

(emphasis added). Plaintiffs allege that this language was a mandate requiring the Secretary to make plaintiffs' allotment selections no later than 4 years after the President directed that allotments be made. The argument continues that if such had been done, plaintiffs would have had their rights to the allotments vested prior to the effect of the Act of June 30, 1919.

The language of the four year proviso of §332, however, is permissive. Plaintiffs have cited not authority indicating that the language was intended to be mandatory. Rather, each plaintiff relies, by main force, upon the fact that plaintiffs, as Indians, are wards or trust beneficiaries vis-a-vis the Government.

While it is not to be denied that the Government generally must act towards Indians in a manner consistent with its fiduciary position, the conclusion leapt to by plaintiffs in this case does not necessarily follow. Plaintiffs are arguing that the Secretary of the Interior should have anticipated that future Congressional action would diminish the estate in allotment selections and acted on behalf of plaintiffs so that their rights would vest prior to such diminution. Plaintiffs have simply failed to cite any authority for the very specific proposition urged.

Neither can this court ignore the plainly permissive language of the statute through liberal construction. If the language was at all ambiguous as to whether the Secretary was *empowered,* as opposed to *directed,* by Congress to make the selections for Indians failing to do so, the court would have some liberty to construe the doubtful language. The court, however, finds the language to be clearly and unambiguously permissive.

The case of *United States v. Arenas,* 158 F.2d 730 (9th Cir. 1947), which is cited both by plaintiffs and the Blackfeet Tribe, is very instructive both on the issue whether it is permissive or mandatory for the Secretary to direct an agent to make allotments under §332 and on the issue of when rights to an allotment vest in the Indian allottee. It is to be noted that it is abundantly clear from the *Arenas* opinion that the court was ever mindful of the special status accorded Indians vis-a-vis the Government and in the courts.

The *Arenas* case considered herein was before the Court of Appeals via the district court (60 F.Supp. 411) after remand from the U.S. Supreme Court in *Arenas v. United States,* 332 U.S. 419 (1944). At issue was the claim of a Mission Indian for trust patents to allotment lands in the Palm Springs Reservation. Arenas claimed entitlement to patents on his own behalf and as heir of his wife, brother and father.

As it is in this case, the chronology of events was critical to the conclusions reached by the Ninth Circuit in *Arenas.* The Supreme Court's decision included the ruling that the General Allotment Act, as supplemented by the Act of March 2, 1917 (39 Stat. 969-976), required that allotments be made on the Palm Springs Reservation. To that extent, the Secretary was without discretion. The agent set upon the task of preparing the allotment schedule. Although he had not been directed by the Secretary to do so, he made allotment selections for Indians who resisted allotments, including Arenas and his family, and submitted the schedule of allotments so prepared to the Secretary for approval

in 1923. The schedule was disapproved by the Secretary because the Indians had not chosen their own allotments. Arenas' father and brother died in 1924 and 1925 respectively.

With respect to the 1923 schedule, the Court of Appeals held that none of the four Indians on whose behalf allotments were claimed had acquired any rights by virtue of that schedule. The Court stated as follows:

> In our view, [the agent] had no power to do this without specific authorization from the Secretary of the Interior. The record fails to show that he had such authorization, nor does the appellee point to any such specific authority from the Secretary. On the contrary, he relies upon the following *general* grant of power, contained in Section 2 of the General Allotment Act of 1887, appearing without change in 25 U.S.C.A. §332. . . .
>
> . . . .
>
> But nothing in the Act of 1917 or the construction thereof by the Supreme Court takes from the Secretary the authority to determine what *method* of allotment shall be followed. Indeed, as we have seen, the Supreme Court has plainly stated that "We assume the Secretary's complete control of the method."
>
> Under Section 2 of the General Allotment Act, quoted above, there must be a *specific direction* from the Secretary to the agent in charge of the allotments that he make selections for Indians who fail to choose for themselves. The record here is barren of any evidence that the Secretary authorized [the agents], or anyone else to make the selections for the Indians who refused to do so.
>
> It might be observed, in passing, that any statute authorizing the Secretary to force land in

> severalty upon the Indians should be strictly construed. Such legislation is in derogation of the general principles of law, which do not favor compulsary ownership of land—especially by persons in a restricted civil status.

158 F.2d at 751-752 (emphasis original).

Thus, it is apparent that the Ninth Circuit decided emphatically, with direct reference to 25 U.S.C. §332, that it is *discretionary* upon the Secretary as to whether or not an agent should be directed to make allotments for Indians.

After disapproval of the 1923 schedule, the agent prepared a new schedule in which the Indians selected their own allotments, which schedule was submitted for approval in 1927. Arenas and his wife appeared on the schedule and certificates of selection were issued to them. An extraordinary delay ensued between submission of the schedule and a decision by the Secretary as to whether patents should issue. In the meantime, every assurance was given the Indians that they would be given their patents and they were permitted to occupy the lands and make improvements thereon.

Finally, on December 14, 1949, 17 years after the 1927 schedule was submitted and in the face of the Supreme Court's decision in *Arenas* issued seven months earlier, the Secretary disapproved the 1927 schedule. Suffice it to say, that the Court of Appeals determined that the reason for this disapproval was a change of policy in the Department concerning allotments generally, at least on the coveted land in the Palm Springs, California area.

The Court of Appeals, as to Arenas and his wife, applied the doctrine set forth in *Allotment Selections on the Fort Belknap Indian Reservation,* 55 Decisions of the Department of the Interior 295 (July 17, 1935). That decision was approved of in the Supreme Court decision in *Arenas,* and essentially stated that once an Indian entitled to an allotment has done everything required by applicable law to acquire an allotment and all that remains is the min-

isterial acts of approval and issuance of patents, the Indian acquires rights to the allotment which are protected and inheritable. This doctrine was found to have been fulfilled by Arenas and his wife and to that extent, Arenas prevailed.

Arenas' father and brother, however, died before they had done what was required to be properly included in the 1927 schedule, and as to the patents sought on behalf of these Indians, the Government prevailed.

In this court's opinion, the foregoing authority is sufficient to enable the court to adjudicate the rights of plaintiffs to the mineral rights underlying their allotments on the Blackfeet Indian Reservation. None of the requisites to the vesting of rights to the allotments occurred prior to the enactment of the Act of June 30, 1919 which required a mineral reservation to the Tribe on all, as then, unallotted land on the Reservation. The Secretary of the Interior was empowered to cause the selections to be made prior to 1919 but he was not required to do so. Such was decided by the court in *Arenas* in the face of a record of egregious resistance to allotments on the Palm Springs Reservation.

Thus, the 1919 Act took nothing away from these plaintiffs to which they were entitled under the law.

IT IS THEREFORE ORDERED and this does order that the complaints in the above entitled cases be and the same are hereby DISMISSED, all parties to bear their own costs and attorneys' fees. LET JUDGMENT BE ENTERED ACCORDINGLY.

DONE AND DATED this 18th day of May, 1984.

PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE